Petition

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

AVIE COHEN and
LEONARD BEDNARZ,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Is a district court empowered to dismiss an indictment when the government has obtained a five month continuance under the Speedy Trial Act for the purpose of taking evidence depositions, but then fails to take the depositions, despite repeated orders from the court to do so.[1]

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[1] While not named in the caption, Anthony M. Carlone was a defendant-appellee in the proceedings below.

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Petitioners, AVIE COHEN and LEONARD BEDNARZ, respectfully request the United States Supreme Court to issue a writ of certiorari to review the opinion and order of the United States Court of Appeals for the Seventh Circuit reversing the dismissal of an indictment by the district court.

OPINIONS BELOW

The oral opinion and order of the United States District Court, Northern District of Illinois, Eastern Division, in case No. 80 CR 456, are unreported, and appear in the Appendix hereto. (App. 7a) The opinion and order of the United States Court of Appeals for the Seventh Circuit in case No. 81-2012 are unreported, and appear in the Appendix hereto. (App. 1a)

JURISDICTION

The opinion and order of the United States Court of Appeals for the Seventh Circuit were entered on December 23, 1981. Petitioners' motion for rehearing was denied by the United States Court of Appeals for the Seventh Circuit on January 29, 1982.[2] This petition for a writ of certiorari was filed within sixty (60) days of the date of entry of that order. The jurisdiction of this court is invoked pursuant to 28 U. S. C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U. S. C. § 3161 provides in pertinent part:

> (c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent.
>
> * * *
>
> (h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
>
> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—
>
> * * *

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[2] A copy of the court's order dated January 29, 1982 denying petitioners' Motion for Rehearing appears in the Appendix hereto. (App. 10a)

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

* * *

(I) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the government; and

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

* * *

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

* * *

(6) If the information or indictment is dismissed upon motion of the attorney for the government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the government, if the judge granted such continuance on the basis of his findings that the ends of justice served by granting such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant or the government continuity of counsel, or would deny counsel for the defendant or the attorney for the government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under paragraph (8)(A) of this subsection shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the government.

18 U.S.C. § 3162(a)(2)

If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense, the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendre shall constitute a waiver of the right to dismissal under this section.

Rule 15. Depositions

(a) When Taken. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or

other material not privileged, be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness.

(b) Notice of Taking. The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time or change the place for taking the deposition. The officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce him at the examination and keep him in the presence of the witness during the examination, unless, after being warned by the court that disruptive conduct will cause him to be removed from the place of the taking of the deposition, he persists in conduct which is such as to justify his being excluded from that place. A defendant not in custody shall have the right to be present at the examination upon request subject to such terms as may be fixed by the court, but his failure, absent good cause shown, to appear after notice and tender of expenses in accordance with subdivision (c) of this rule shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.

(c) Payment of Expenses. Whenever a deposition is taken at the instance of the government, or whenever a deposition is taken at the instance of a defendant who is unable to bear the expenses of the taking of the deposition, the court may direct that the expense of travel and subsistence of the defendant and his attorney for attendance at the examination and the cost of the transcript of the deposition shall be paid by the government.

(d) How Taken. Subject to such additional conditions as the court shall provide, a deposition shall be taken

and filed in the manner provided in civil actions except as otherwise provided in these rules, provided that (1) in no event shall a deposition be taken of a party defendant without his consent, and (2) the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself. The government shall make available to the defendant or his counsel for examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the government and to which the defendant would be entitled at the trial.

(e) **Use.** At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with his deposition. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts.

(f) **Objections to Deposition Testimony.** Objections to deposition testimony or evidence or parts thereof and the grounds for the objection shall be stated at the time of the taking of the deposition.

(g) **Deposition by Agreement Not Precluded.** Nothing in this rule shall preclude the taking of a deposition, orally or upon written questions, or the use of a deposition, by agreement of the parties with the consent of the court.

Rule 48(b) of the Federal Rules of Criminal Procedure states:

If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

STATEMENT OF THE CASE

Proceedings Before the District Court

On August 8, 1980, Avie Cohen ("Cohen"), Leonard Bednarz ("Bednarz") and Anthony M. Carlone ("Carlone") were indicted in the United States District Court for the Northern District of Illinois, based upon an alleged arson in Copenhagen, Denmark on September 19, 1975. Carlone was arraigned on August 9, 1980. Cohen and Bednarz were arraigned on August 27, 1980.

On September 18, 1980, a superceding indictment was published, identical to the original indictment, except that two additional alleged co-conspirators, Jan Assarsson and Sven Assarsson, were also indicted. Arraignment for all defendants named in the superceding indictment took place on October 15, 1980. On November 3, 1980, trial was set for January 5, 1981.

November 24, 1980 Hearing

During a status hearing on November 24, 1980, the court confirmed the January 5, 1981 trial date:

> "The important thing for you to know is the motions to dismiss are denied and the trial will go forward on January 5th. [Regarding local counsel's request for a one or two week continuance on behalf of counsel from Minnesota]—if we don't try this on the 5th, we don't try it. That will be a firm date. January 5, that is the only firm date, in the whole cosmos of dates, that I'm sure will be firm . . . Tell [Minnesota] counsel to arrange his calendar to be here."

December 12, 1980 Hearing

A second status hearing was held on December 12, 1980. Neither Carlone nor his counsel were present at this hearing. The government opened by indicating that a new prosecutor from the Justice Department Strike Force was taking over the case. After indicating that the court was not willing to grant Cohen's motion for a continuance of only sixty (60) days, the

court reluctantly granted the government's motion for a continuance until May 18, 1981, based upon the alleged unwillingness of two Scandanavian witnesses to come to the United States to testify. The government indicated that it would be necessary to travel to Europe to take their evidence depositions.

However, the court reconsidered its order when Carlone objected to the continuance by a letter of December 15, 1980. The trial was rescheduled for January 26, 1981.

December 22, 1980 Hearing

On December 22, 1980, another status hearing was held. Based upon reported difficulties in scheduling the deposition of a foreign witness, the unavailability of counsel for the defendants until after January 1, 1981 to schedule the foreign depositions, and the vacation plans of another foreign witness, the government again moved for a continuance until May 18, 1981. The court expressed dismay at the length of the requested continuance. However, the court granted a continuance until January 30, 1981 to permit the government to take the evidence depositions it desired:

> "All right. *I will extend the time of the government, to get these depositions, to January 30th; and we will have a status report on that date. You have got to have the depositions done by then, so start now, arranging them. We just can't put this over four months, five months, in order to get three depositions abroad.* I will have a status report on the 30th; have a report from the government on the depositions; decide what to do next; and set for trial, whenever we can, shortly thereafter. I don't know what the schedule will be, but I will have to work it in, somehow. *If I can't set it for trial, because of my other commitments, I will arrange to have some other judge try it.*
>
> In the meantime, I do regard this as excludable time under the Speedy Trial Act; and I make a finding, based on the government's representations, to that effect.

January 30th for further status and to set for trial, with the expectation that the foreign depositions will be completed by that date." [Emphasis added.]

However, the government failed to prepare Letters Rogatory and made no attempt to request the court to apply for international judicial assistance.

January 30, 1980 Hearing

By January 30, 1981, Carlone had filed a motion to reconsider the continuance granted to the government on December 22, 1980. At the status hearing on January 30, 1981, the government advised the court that the depositions had not yet been taken, and that arrangements had not yet been made for taking them. The government also indicated that it was preparing proposed stipulations in an effort to obviate a trip to Europe, but nothing was presented to the defendants at that time.

Frustrated with the government's lack of due diligence, the court stated:

> "I have the same sense as [the defendants]—*I find the leisurely, foot-dragging approach of the government totally inconsistent with the purposes of the Speedy Trial Act; and I don't understand that.* If there is a possibility of stipulating to the testimony of the Swedish witnesses, I don't know why that wasn't explored the day it was decided that they had to be deposed.
>
> The Speedy Trial Act bothers me—I am not sympathetic with the Act, but I am bound by it. I am even more bothered by the fact that the indictment came in just under the statute of limitations, which is a troublesome aspect of this case. I am very bothered by the fact that if we all go through the trouble of going to Sweden, getting depositions, conducting a lengthy trial, and if it eventuates in a conviction, everything we are here discussing may be rehashed before the Court of Appeals and they may have the same concerns I have over the delays here.

I must say that I don't regard the government as having pursued this aggressively—in even the broadest sense of that word—and I'm disturbed by that.

My intention—after reading this pleading, today and coming out and listening to all of this, today—was to set the case for trial for the end of February; and if you get to Sweden, fine; if you don't, you go without them. I hate to do that, but that is the direction I am being pushed, by virtue of the way the government is handling this case. If there are good reasons for the leisurely approach to this case, I haven't been given to understand what they are. *I haven't heard any explanations of the government's slow handling of this process, which I think justify the way it has been handled. I feel highly critical of the way the government is handling the case.*

We have got a serious offense here—we are going to try it or we aren't going to try it; and if we are going to try it, *I don't know why everybody on the government's side seems to be sleeping.*" [Emphasis added.]

The court then continued Carlone's motion to reconsider the granting of the continuance for another status hearing.

February 10, 1981 Hearing

By the next status hearing on February 10, 1981, the government filed a motion, under Rule 15 of the Federal Rules of Criminal Procedure, to depose the foreign witnesses. It was noted at the hearing that the defendants could not stipulate to the testimony of the Scandanavian witnesses. The government's motion to depose foreign witnesses was granted and Carlone's motion for reconsideration was summarily denied. The court held as follows:

"The findings are—the record supports the findings, because of the extraordinary circumstances, here, in the interest of justice, *for a way of obtaining the testimony of witnesses, which the government says are essential to the*

presentation of its case, this delay is justifiable, as excludable time, under the Speedy Trial Act.

So get your orders prepared, Ms. Hugo, for whatever you need from me; drop them off in chambers; I will sign them; serve copies on everybody; and on May 11th, if I'm still alive, we will go to trial." [Emphasis added.]

Furthermore, the court once again expressed its attitude about the government's lack of due diligence:

"I made some remarks critical of the government's speed in getting this case ready for trial, the last time. I don't have to repeat them, but *I haven't been disabused of my notion that the government has not been diligent* . . ." [Emphasis added.]

Yet, the government still failed to seek international judicial assistance to take the depositions it claimed were essential to its case.

May 11, 1981 Trial Date

On May 11, 1981, the case was called for trial. However, the government was not ready. Carlone renewed his motion for reconsideration of the December 22, 1980 continuance, which was adopted by the other defendants. Meanwhile, the government had moved the court to apply for international judicial assistance on May 8, 1981, or only three (3) days before the May 11, 1981 trial date. The court was unable to hear argument on these motions at that time. Thus, the case was continued until May 22, 1981.

May 22, 1981 Hearing

On May 22, 1981, Cohen moved for dismissal of the indictment on the basis of the government's lack of due diligence. Bednarz initially joined the motion, as Carlone did

later in the hearing. The government gave three reasons for failing to take the depositions in question. Each was rebutted by the defendants:

1. The government asserted for the first time that it was experiencing difficulty in determining how to seek international judicial assistance. However, the defendants asked the court to take notice of a section in the United States Attorney's Manual clearly setting forth "How to Obtain International Judicial Assistance."

2. The government also contended that no previous request for international judicial assistance had been made to Sweden. The defendants rebutted this contention by producing a copy of a previous request.

3. The government next asserted ongoing plea negotiations and the substantial costs involved in the taking of the foreign depositions. Nonetheless, the defendants demonstrated that there is no basis for excluding time for mere plea bargaining or the cost of a prosecution under the Speedy Trial Act.

After considering the arguments of the parties, the court granted defendants' motions for reconsideration and to dismiss the indictment. The court stated in part:

> "I have already indicated how I feel about the Speedy Trial Act, and under its pressure we set January 5th as a trial date. The government was not ready on January 5th, and the trial date was put over to May 11th, although it is not necessary for a decision of this precise issue, *the government was not ready on May 11th and the government is not ready now. The reason for the government's lack of readiness has to do with the necessity to take depositions abroad which became the sine qua non of getting the case ready for trial. Those depositions, I might add, are not yet taken. The delay between the original January 5th trial date and the May 11th trial date, which I had originally regarded as excludable time was deemed excludable based upon the government's contention at that time that they were gearing up for an immediate taking of those depositions after the*

obtaining of Letters Rogatory, and that everybody was working towards that end.

The fact that those depositions had not been taken is now explained with a variety of excuses. One, that the government was trying to obtain a plea which obviously is factual, and I don't quarrel with—unfortunately it is not a basis for excluding time under the Speedy Trial Act in accordance with the legislation and the decision as I understand it. The government was motivated in its plea negotiations and other things by trying to save the great expense of the activities abroad, a very commendable goal, but one which the legislature in its infinite wisdom failed to include as a reason for excludable time. The government had a change of prosecutors which is always a difficulty in cases of this type, but once again not a basis for exclusion. The government was having trouble with the bureaucracy in Washington which the government always does when you have to deal with Washington, but not a basis for exclusion, and finally, the government was having trouble with the court, since I didn't like the format of the Letters Rogatory order and suggested that it be re-drafted. None of these, unfortunately, are adequate reasons for excludable time. I have been pushing since December of 1980 to get this case to trial and without success. *I do remember the atmosphere of one of the hearings in this court in which my attitude was one of—get these depositions done by the end of January or else. I remember imposing on the government very stringently the burden of getting this activity taken care of without any further delays, and it was my attitude at the time that the government was not acting with diligence and nothing I have heard today has changed that.*

I granted a long period of excluded time to allow depositions in Sweden of witnesses who had suddenly, on the eve of trial, become uncooperative. *The excludability of that time depended upon the assurances of the government that they would, with diligence, get the testimony of those witnesses through Letters Rogatory and depositions. That was five months ago, and the depositions have not yet been taken and the Letters Rogatory have not yet been issued.*

The Speedy Trial Act imposes a duty of diligency not only on the court but on the government. In the real world the government would have good reasons for doing what it has done, and in the real world I would have respected, in the exercise of my discretion, the problems the government has been having. The Speedy Trial Act takes us out of the real world and puts us in the structured world of the timetable for that Act and the limited exceptions that the Act provides. *The reasons that were given me for excluding the time between the January 5th trial date and the May 21st[sic], I think it was, trial date, have in fact demanded that the government, under the circumstances and on what I relied, was not forthcoming. The conduct of the government in the preparation of this case can by no stretch of the imagination be described as diligence.*

* * *

The motion of the defendants to reconsider the December 22nd order granting a continuance and excluding the time granted, this motion is granted. I do not regard that time as excludable. That means the motion of the defendants to dismiss by reason of the Speedy Trial Act is granted." [*Emphasis Added*]

ISSUES RAISED ON APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

1. Did the District Court Have the Power to Dismiss the Indictment Because of the Government's Lack of Due Diligence?

The first issue involved whether or not a district court was empowered to revoke a series of continuances granted to the government under the Speedy Trial Act, based upon a need to go to Europe to take evidence depositions, when the government failed to take the depositions, or even make arrangements

to do so, during the five months alloted. In essence, the government argued that it was surprised unfairly by the order vacating the continuances when it had no way of anticipating the court's action. To bolster its argument the government set forth several additional grounds which it claimed *could have been* a basis for granting the continuance, if they had been asserted in the first instance. The ground argued most forcefully by the government pertained to its efforts to secure guilty pleas to obviate the trip to Europe.[3] (This ground was asserted for the first time on the date set for trial, May 11, 1981.)

The defendants, in turn, contended that the government's argument about unfair surprise was disingenuous. The district court repeatedly directed the government to prepare Letters Rogatory and take the depositions before May 11, 1981. Further, the court consistently admonished the government about the strictures of the Speedy Trial Act. Yet, the court's orders and admonitions were ignored.

The defendants also demonstrated that the Speedy Trial Act does not contain a provision for granting a continuance for mere plea bargaining. It only contains a provision for the exclusion of time while a proposed plea agreement is pending before the court for approval. 18 U. S. C. § 3161(h)(1)(I). No agreement was ever reached, much less presented to the court for its approval. In any event, the defendants argued that even if it were appropriate for the court to consider plea bargaining as a basis for a *prospective* continuance, there is absolutely no basis for considering plea bargaining as a justification for a delay, retroactively. (Similarly, the defendants argued that it was inappropriate for the government to raise other grounds for the continuance for the first time on the date set for trial, May 11, 1981.)

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[3] The other reasons involved the change of prosecutors in December, 1980, a one week illness and a short vacation of the government's attorney, and difficulty in preparing Letters Rogatory.

2. Was the Government Automatically Entitled to an Indefinite Exclusion of Time Under the Speedy Trial Act Without Relying Upon 18 U. S. C. § 3161(h)(3)?

The second issue raised by the government on appeal involved whether or not the government was entitled to an automatic and indefinite exclusion of time under the Speedy Trial Act for the alleged unavailability of essential witnesses, when the government failed to seek such a delay under 18 U. S. C. § 3161(h)(3), but, instead, sought an "ends of justice" continuance under 18 U. S. C. § 3161(h)(8)(A) and (B) to take evidence depositions within a prescribed period of time.

The defendants responded by arguing that the government should be precluded from raising the issue of the unavailability of essential witnesses for the first time on appeal.[4] The defendants also argued that the government had the burden of going forward with evidence at a hearing in connection with a section 3161(h)(3)(A) and (B) exclusion. *See* 18 U. S. C. § 3162(a)(2). No such hearing was requested by the government or held by the court. Rather than relying upon this provision the government elected to proceed to trial. The government only requested additional time to take evidence depositions in Europe to establish its case.

THE DECISION OF THE UNITED STATES COURT OF APPEALS

In issuing its opinion, the Court of Appeals reviewed the dismissal of the indictment from two perspectives. First, the Court of Appeals stated that:

> "The [district] court apparently thought that if the actual causes of delay in beginning the trial were not valid grounds for the grant of an excludable continuance, it *had*

[4] *United States of America* v. *Fielding*, 645 F. 2d 719 (9th Cir. 1981).

> to vacate the continuance retroactively to the original date; the Speedy Trial Act, which the court said 'takes us out of the real world,' left him with no choice. We disagree. There is nothing in the Speedy Trial Act which says that a continuance valid when granted becomes invalid *ab initio* if the reasons for which the continuance was granted turn out not to be the actual causes of delay that the continuance allows. *Contingencies not forseen when the continuance was asked for and granted may arise that prevent the government from using the continuance for the purposes for which it was granted.* If so, the court can refuse to grant further continuances; it can revoke or shorten the continuance, but it is not required to revoke the continuance with effect back to the original trial date." [Emphasis added.]

App. 4a. However, the Court of Appeals never identified the "unforseen contingencies" which supposedly prevented the government from using the continuance for its original purpose,[5] taking evidence depositions in Europe. Nor did the Court of Appeals attempt to justify the government's failure to make any effort to obey the three court orders to set the machinery in motion for taking the depositions in Europe.

In the alternative, the Court of Appeals held that the district court abused its discretion by dismissing the indictment on the basis of the government's misuse of the time alloted by the court to take the evidence depositions in Europe. While acknowledging the power of a district court to exercise "... broad and flexible powers to prevent the abuse of their processes ...," the Court of Appeals held that this case did not warrant the exercise of those powers. App. 5a.

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[5] Certainly, the government was in a position to determine, or at least estimate, the expenses involved in traveling to Europe on December 12, 1980, when it first moved the court for a five month continuance.

Furthermore, the Court of Appeals stated that:

> "A judge could (but did not here) expressly condition the grant of a continuance on the government's taking specified actions according to a prescribed timetable."

App. 5a. Yet, this is exactly what the district court did. On May 22, 1981, the district court stated that the:

> "... necessity to take the depositions abroad ... became the *sine qua non* of getting the case ready for trial.
>
> * * *
>
> "The excludability of that time depended upon the assurances of the government that they would, with diligence, get the testimony of those witnesses through Letters Rogatory and depositions. That was five months ago, and the depositions have not yet been taken and the Letters Rogatory have not yet been issued."

Finally, the Court of Appeals indicated that in appropriate cases a district court may dismiss an indictment without reference to the Speedy Trial Act under Rule 48(b) of the Federal Rules of Criminal Procedure, if the government has "... procured a continuance by deliberate misrepresentation and the delay caused by the continuance was seriously prejudicial to the defendant." App. 5a.

Nonetheless, this is precisely what occurred. The government consistently advised the court that it was planning to go to Europe to take evidence depositions, but its actions belied its representations. The government, in fact, only engaged in plea negotiations with defendants Cohen and Carlone, and plea negotiations alone are not a basis for excluding time under the Speedy Trial Act. To be sure, the long unnecessary delay caused by the government was seriously prejudicial to the defendants' rights under the Speedy Trial Act.[6]

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[6] The Court of Appeals did not even entertain the government's argument that it was automatically entitled to an indefinite exclusion of time under 18 U. S. C. § 3161(h)(3)(A) and (B) without going forward with evidence. *See* 18 U. S. C. § 3162(a)(2).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals raises important questions about the application of the Speedy Trial Act and the administration of the criminal justice system in the United States. By enacting the Speedy Trial Act, 18 U. S. C. § 3161 *et seq.*, Congress intended to expedite the handling of criminal cases to restore public confidence in the criminal justice system. Congress further intended to implement the Sixth Amendment guarantee of the right to a speedy trial for defendants within the federal system. S. Rep. 96-212, 96th Congress, 1st Sess. 6 (1979). However, the decision of the Court of Appeals has dealt a severe blow to the purposes of the Speedy Trial Act and eliminated the discretion of a district court to dismiss a criminal case when the government disobeys repeated court orders and actively thwarts the underlying purposes of the Speedy Trial Act.

The Supreme Court should grant the present petition for a writ of certiorari to clarify the powers of a district court to prevent abuses of the Speedy Trial Act by the government. The granting of the present petition will also resolve a conflict between the Second and Seventh Circuit regarding the availability of plea bargaining as a basis for delaying a criminal trial under the Speedy Trial Act

THE COURT OF APPEALS ERRED IN REVERSING THE ORDER OF THE DISTRICT COURT DISMISSING THE INDICMENT BECAUSE OF THE GOVERNMENT'S LACK OF DUE DILIGENCE

Under the Speedy Trial Act, a defendant must be tried within seventy (70) days of the date on which he appears before the court, if it is his first appearance after an indictment has been issued. 18 U. S. C. § 3161(c)(1). This seventy day period may be extended to accommodate various delays which Congress deemed reasonable in enacting the Speedy Trial Act.

Of importance to this case are the provisions dealing with continuances granted to the government to serve the "ends of justice." 18 U. S. C. § 3161(h)(8)(A).

In considering a motion for a continuance, a district court is required to make specific findings of fact demonstrating that "... the granting of such a continuance outweighs the best interests of the public and the defendant in a speedy trial." *Id.* The Speedy Trial Act sets forth various factors that the court must consider. 18 U. S. C. § 3161(h)(8)(B). While the court may consider "other factors" not enumerated, all relevant factors must be presented to the court when a motion is filed seeking a continuance *prospectively,* rather than after the passage of time, to justify a lack of due diligence.

In the present case the government and the defendants were expecting to go to trial on January 5, 1981, when the government was advised in December of 1980 that two of its foreign witnesses were unwilling to travel to the United States to testify. Since the government advised the court that these witnesses were "critical" to its case, the government was left with three alternatives: (1) abandon the prosecution and dismiss the indictment;[7] (2) suspend the prosecution by seeking an indefinite exclusion of time under the Speedy Trial Act, pursuant to 18 U. S. C. § 3161(h)(3)(A) and (B); or (3) take evidence depositions of the foreign witnesses and hope that the deposition testimony would be admissible at trial.

Apparently, the government was unwilling to accept the first alternative of dismissing the indictment. The second alternative of seeking an indefinite delay of the trial was also unappealing because a violation of the defendants' constitutional right to a speedy trial under the Sixth Amendment was likely to mature through the passage of time, if the

[7] The defendants could not be reindicted because the five year statutory period of limitations had run in September, 1980 (only one month after the original indictment was returned).

government could not convince the foreign witnesses to travel to the United States.

The third alternative presented numerous problems. Initially, there were questions about how the defendants' constitutional right to confront and cross examine the foreign witnesses could be guaranteed. The government reported to the court that the defendants' counsel would not be permitted to cross examine the foreign witnesses. Instead, counsel would only be permitted to submit questions to be propounded by a Swedish "defense attorney," eliminating the ability of defendants' chosen counsel to ask follow-up questions in the natural colloquy of cross examination. *See* Rule 15(d) of the Fed. R. Crim. Pro.; *United States* v. *Bosch,* 505 F. 2d 78 (5th Cir. 1974); *Douglas* v. *Alabama* 380 U. S. 415 (1965). In addition, the government clearly anticipated problems in using deposition testimony to prove facts essential to a criminal prosecution. *United States* v. *Mann,* 590 F. 2d 361 (C.A. P.R. 1978).[8]

The third alternative also presented a practical problem. The cost of traveling to Europe with defense counsel was estimated by the government to be from $30,000 to $40,000. The government noted that such an expenditure would consume one-quarter of the Department of Justice's fiscal budget for travel.

Instead of facing these difficult alternatives squarely, the government decided to pursue plea negotiations, without making any contingency plans for taking depositions in accordance with its representations to the court. In so doing, the government assumed the risk that the district court would dismiss the indictment if the plea negotiations proved to be unsuccessful.

Clearly, plea negotiations alone do not provide a basis for obtaining an exclusion of time under the Speedy Trial Act. An exclusion of time is only permitted for a period during which

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[8] *See United States* v. *Benfield,* 593 F. 2d 815 (8th Cir. 1979); *United States* v. *Thevis,* 84 F. R. D. 57 (N. D. Ga. 1979).

the court is considering a proposed plea agreement. 18 U.S.C. § 3161 (h)(1)(I). No agreement was ever reached by the parties, much less presented to the court for its approval.[9] Thus, the government misrepresented its intentions to the district court and sought a continuance to take depositions in Europe when it never really intended to take them. By creating a false impression that trial was imminent, the government also attempted to place pressure upon the defendants to enter guilty pleas.

Even assuming, *arguendo*, that mere plea bargaining is a factor which may be considered by the court, it is still the responsibility of the government to move the court for such a continuance so that the time may be excluded *prospectively*.[10] In the present case, the government waited until the date of trial to justify its failure to take the depositions in Europe as a result of plea bargaining. Therefore, the defendants were never given an opportunity to object to the granting of a continuance for this purpose.[11] Nor could the court have made any findings of fact to justify the *granting* of an "ends of justice" continuance.

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[9] If plea bargaining were intended to be a basis for delay Congress would have broadened its exception for proposed plea agreements. As the Supreme Court stated in *Cannon* v. *University of Chicago*, 441 U. S. 677 (1979); "expressio unius est exclusio alteriusi."

[10] As noted earlier, the government has argued that the district court was not authorized to vacate a continuance retroactively. Yet, this argument is clearly inconsistent with the government's argument about plea bargaining, because the government did not mention plea bargaining as a basis for justifying the delay between December 12, 1980 and May 11, 1981 until the end of that period.

Moreover, defendants contend that there is a substantial difference between vacating a continuance retroactively for the failure to obey repeated court orders and consideration of an alleged basis for a continuance which was not raised in a timely manner.

[11] The defendant Bednarz steadfastly refused to plea bargain with the government at all times. While Cohen and Carlone engaged in plea bargaining they never consented to an exclusion of time for this purpose.

18 U. S. C. § 3161(h)(8)(A) and (B).[12] *Cf., United States of America* v. *Fielding,* 645 F 2d 719 (9th Cir. 1981).

By recognizing a governmental perogative to utilize plea bargaining as a basis for obtaining excludable time retroactively, the Seventh Circuit has differed sharply with the views of the Second Circuit. In *United States of America* v. *New Buffalo Amusement Corp.,* 600 F. 2d 368 (2d Cir. 1979), the Second Circuit stated:

> "Good faith plea negotiations by a defendant should not be equated with a waiver of Speedy Trial rights, and, under the circumstances, the government must assume responsibility for the risk of institutional delays where the bargain is ultimately unsuccessful."

Id. at p. 378. *United States of America* v. *Carini,* 562 F. 2d 144 (2d Cir. 1977). The government always knew that its plea negotiations with the defendants might not succeed. Thus, by not making contingency plans to take the foreign depositions in the extensive time alloted by the court the government assumed the risk that the court would dismiss the indictment.

THE DISTRICT COURT HAS THE INHERENT POWER TO DISMISS AN INDICTMENT WHEN THE GOVERNMENT REFUSES TO OBEY THREE ORDERS TO TAKE DEPOSITIONS IN EUROPE OVER A FIVE MONTH PERIOD

The Court of Appeals acknowledged the "broad and flexible powers" of a district court to prevent an abuse of its processes. App. 5a. However, the Court of Appeals held that the district court abused its discretion in exercising these powers. *Id.* To the contrary, it was the Court of Appeals that erred in finding that there was an abuse of discretion by the district court against the background of the Speedy Trial Act and the proceedings below.

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[12] *United States of America* v. *Aviles,* 623 F. 2d 1192 (7th Cir. 1980).

If nothing else the Speedy Trial Act was designed to avoid *unnecessary* delays in bringing defendants to trial. In the present case, the government learned in December, 1980, that its foreign witnesses would not be available for trial. By then, the government changed prosecutors and was in a position to determine the expense of a trip to Europe. The government sought and obtained a series of continuances, totalling five months, to take evidence depositions in lieu of trial testimony. The court reluctantly granted this delay, but directed the government on three separate occasions to begin preparations for taking the depositions, so that the case could be tried on May 11, 1981. The court even warned the government about the requirements of the Speedy Trial Act. Nevertheless, the government ignored those orders and warnings and did nothing during the five month period to further the case toward trial.

It is truly difficult to understand how the district court abused its "broad and flexible powers" under these circumstances. To be sure, the Seventh Circuit should not have reversed the decision of the district court unless it was clearly erroneous. *United States of America* v. *Fielding,* 645 F. 2d 719 (9th Cir. 1981). On the contrary, the district court's decision was based upon the exercise of sound judgment, after the government failed to demonstrate why it did not obey repeated orders of the court.

If problems arose which could not have been foreseen on December 12, 1980, which would have made it very difficult, or impossible, to take the depositions in question, there may have been a basis for additional delay. However, it must be emphasized that nothing else happened during the five month period to alter the court's reasonable expectation that the government would take the depositions and be ready for trial on May 11, 1981. Indeed, the government did not even submit the Letters Rogatory to the court to begin the process until May 8, 1981, or only three days before the date set for trial.

The government's reliance upon plea negotiations alone is faulty. Simply stated, there is nothing inconsistent about pursuing plea negotiations and making plans to take the foreign depositions at the same time. The defendants never disputed the government's interest in saving taxpayer funds by pursuing guilty pleas. Quite apart from the absence of a provision allowing for an the exclusion of time under the Speedy Trial Act to plea bargain, the government simply failed to demonstrate any additional expense in merely making plans to take the depositions, so that in the event plea negotiations were unsuccessful the government could still proceed to trial.

THE GOVERNMENT DID NOT HAVE AN ABSOLUTE RIGHT TO AN ADDITIONAL CONTINUANCE

Although the power to revoke a continuance is not expressly found within the Speedy Trial Act, there are cogent reasons for justifying the dismissal of the present indictment. The district court set the case for trial on May 11, 1981.[13] Indeed, the government never claimed that it was ready for trial on May 11, 1981, in the event that the court refused to grant an additional continuance. Even if the seventy day period had not elapsed under the Speedy Trial Act, the court had the inherent power to refuse the government an additional continuance.

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[13] May 11, 1981 was not a mere "status hearing" as the Court of Appeals described it. App. 3a. The district court set that date for trial on February 10, 1980. The court stated:

> "So, get your orders prepared, Ms. Hugo, for whatever you need from me; drop them off in chambers; I will sign them; serve copies on everybody; and *on May 11th, if I'm still alive, we will go to trial.*"

As such, it was wholly inappropriate for the government to have presumed that this case could be tried at any time before June 24, 1981, as it argued below, without obtaining an additional continuance from the court based upon a showing of due diligence. 18 U. S. C. § 3161(h)(8)(C).

These powers were recognized by the First Circuit in *United States of America* v. *Waldman,* 579 F. 2d 649 (1st Cir. 1978):

> "It is axiomatic that the district court has inherent power to control its own docket to ensure that cases proceed before it in a timely and orderly fashion . . . The power to grant or deny a continuance is a basic tool committed to the discretion of the trial court to effectuate this purpose. *United States* v. *Correia,* 531 F. 2d 1095, 1098 (1st Cir. 1976)."

Id. at p. 653. (*See also* p. 653, n. 8.)

Furthermore, the Speedy Trial Act itself states that "[n]o continuance shall be granted because of . . . lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the government." 18 U. S. C. § 3161(h)(8)(C). Clearly, the government was unable to demonstrate that it was diligently preparing for trial, but still required more time due to unforeseen circumstances.[14] The government did not have an absolute right to an additional continuance, and the district court did not abuse its discretion in refusing to grant one. *United States of America* v. *Aviles,* 623 F. 2d 1192 (7th Cir. 1980).[15]

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[14] It should be noted that the government claimed that it was ready for trial in December, 1980, before it learned about the refusal of the Scandanavian witnesses to testify at trial. Ostensibly, no more preparation was needed except for the depositions to be taken.

[15] In addition to the Speedy Trial Act, and the court's inherent powers to connrol its own docket Rule 48(b) of the Federal Rules of Criminal Procedure allows a district court to dismiss an indictment if there has been an "unnecessary delay in bringing a defendant to trial." There can be no doubt that the delay caused by the government in the present case was unnecessary. Moreover, the power to dismiss the indictment rests within the sound discretion of the trial court. *United States of America* v. *Salzman,* 417 F. Supp. 1139 (E. D. N. Y. 1976), aff'd, 548 F. 2d 395 (2d Cir. 1976); *United States of America* v. *Mehrmanesh,* 652 F. 2d 776 (9th Cir. 1981).

CONCLUSION

The due diligence standard which underlies the court's inherent power to dismiss an indictment applies with equal force to the court's powers under the Speedy Trial Act.[16] The government's basic responsibility to proceed with due diligence against a criminal defendant was the single overriding factor behind the enactment of the Speedy Trial Act. This is nowhere better illustrated than in the Senate Report concerning the 1979 amendments to the Act, which states:

> "In the main, the Act is the first embodiment with force of national law to quantify, balance and implement the various guarantees implicit in the command of the Sixth Amendment which provided that, '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .'"

S. Rep. 96-212, 96th Congress, 1st Sess. 6 (1979).

Yet, the history of this case is replete with conduct inconsistent with the specific provisions and broader purposes of the Speedy Trial Act. As early as December 12, 1980, the government was aware that its Scandinavian witnesses were not

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[16] Section 3162(a)(2) provides:

> If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a guilty plea or nolo contendere shall constitute a waiver of the right to dismissal under this section.

willing to travel to the United States to testify at trial. Based upon the government's repeated representations to the court that evidence depositions would be taken promptly, the trial court granted the government a series of continuances totalling five months. Despite repeated orders from the court, the government failed to even make arrangements for the depositions by the date the case was set for trial, May 11, 1981.

On the basis of the government's lack of due diligence, the court properly held that the period of time granted to the government to take foreign depositions was unexcludable under the Speedy Trial Act. Since more than seventy (70) days had elapsed under the Speedy Trial Act, the court dismissed the indictment. 18 U. S. C. §§ 3161(c)(1) and 3162(a)(2).

On appeal, the government claimed that it was surprised by the court's dismissal of the case. Yet, the record of the proceedings below clearly belies this assertion. The trial court repeatedly warned the government about the strictures of the Speedy Trial Act.

Thus, the trial court appropriately refused to grant an additional continuance and properly dismissed the indictment. The provisions of the Speedy Trial Act and the inherent power of the trial court provide more than sufficient authority to support the trial court's dismissal of the indictment in this case. To be sure, the government should not be permitted to repeatedly disobey court orders and make such flagrant misrepresentations to the court. Nor should the government be permitted to rely upon plea negotiations to justify its lack of due diligence.

The United States Court of Appeals for the Seventh Circuit has, in fact, erred in holding that the district court abused its discretion by dismissing the indictment. The decision and order of the Court of Appeals in this case effectively nullifies the intent of Congress to vest full discretion in the trial court to dismiss a criminal prosecution when the government thwarts

the underlying purposes of the Speedy Trial Act. If this decision were permitted to stand it would substantially erode the impact of the Speedy Trial Act in preventing governmental abuse of the criminal trial process. Thus, the Supreme Court should grant the present petition for a writ of certiorari to clarify the powers of a district court and to resolve the conflict between the Second and Seventh Circuits concerning the use of plea bargaining as a basis for excludable time under the Speedy Trial Act.

WHEREFORE, the petitioners pray that this Honorable Court grant this petition for a writ of certiorari.

Respectfully submitted,

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Appendix

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In the

United States Court of Appeals

For the Seventh Circuit

No. 81-2012

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

ANTHONY M. CARLONE, AVIE COHEN and LEONARD BEDNARZ,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80-CR-456—**Frank J. McGarr**, *Judge.*

ARGUED DECEMBER 11, 1981—DECIDED DECEMBER 23, 1981

Before CUMMINGS, *Chief Judge*, and SPRECHER and POSNER, *Circuit Judges.*

POSNER, *Circuit Judge.* This appeal by the government from an order dismissing an indictment raises a question of first impression under the Speedy Trial Act, 18 U.S.C. §§ 3161 *et seq.*, relating to the power of a district judge to vacate a continuance retroactively to the date when he granted it.

The indictment, filed on August 7, 1980, alleged that the defendants had violated a number of federal criminal statutes through a scheme devised and carried out in 1975. They shipped worthless goods from Illinois to Denmark, where the goods were stored in a warehouse owned by the city of Copenhagen. They

insured the goods—whose value they overstated—with a Swedish insurance company. They then set fire to the warehouse, destroying the goods, and filed a claim with the insurance company for the inflated value.

Trial was originally scheduled for January 5, 1981. But in December 1980 the government learned that two of its key witnesses, a Swedish woman who had filed the insurance documents claiming damages for the destroyed shipment and a Danish insurance adjuster who had viewed the goods and found them to be worthless, were unwilling to come to the United States to testify—the adjuster because he feared for his life if he came. The government moved for a continuance, which the court granted to January 30. The court directed that the period of the continuance be excluded from the time within which the government had to try the defendants under the Speedy Trial Act. The continuance was subsequently extended to May 11.

The government now set about to get the testimony of the Scandinavian witnesses in some form. However, one of the witnesses was not available to be deposed during the entire month of February, and the lawyer for one of the defendants was unavailable during the whole of January to attend a deposition abroad. Some time was also lost when the government attorney handling the case resigned and was replaced. Hoping to avoid having to take depositions abroad, the government prepared stipulations of the foreign witnesses' testimony, but defense counsel would not agree to the stipulations.

The earliest date for the depositions that would suit everyone turned out to be April 20. But as the government's lawyer began to prepare the letters rogatory that would be necessary to take the depositions, she discovered that the cost to the government could be as much as $40,000. Since this would put a big crimp in the Justice Department's travel budget, she was urged by her superiors to negotiate a plea with one of the defendants in exchange for his cooperation; it was felt that the evidence which a cooperating defendant would give would be an acceptable substitute for the foreign witnesses' testimony. Plea bargaining ensued, but collapsed on April 20. The government's lawyer then set

about preparing letters rogatory in earnest. She presented them to the court for its signature some days prior to the May 11 status hearing, but the court objected to the form of the documents and ordered her to redraft them.

On May 11 the defendants renewed their objection to the continuance. The motion was heard on May 22, and at the conclusion of the hearing the court in an oral opinion granted the motion and vacated the continuance all the way back to January 5, the original trial date. Without exclusion of the period during which the continuance had been in effect, no time remained under the Speedy Trial Act to try the defendants, so the court also dismissed the indictment. The court did not indicate whether the dismissal was with or without prejudice, but this made no practical difference since the statute of limitations on the offenses charged in the indictment had now run.

The question on this appeal is whether the district judge had the power to vacate the continuance with retroactive effect and, if so, whether he abused that power in the circumstances of this case.

Under 18 U.S.C. § 3161(h)(8)(A), any delay caused by a continuance is excluded in determining the time limits within which a defendant must be tried "if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." Section 3161(h)(8)(B) is a nonexclusive list of factors that the judge is required to consider in deciding whether to grant an excludable continuance. They include whether failure to grant it "would be likely to make a continuation of [the criminal] proceeding impossible, or result in a miscarriage of justice"; whether the case is "so complex . . . that it is unreasonable to expect adequate preparation for . . . the trial" within the time limits specified by the Act; and whether the failure to grant the continuance "would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking

into account the exercise of due diligence." However, 18 U.S.C. § 3161(h)(8)(C) provides that no excludable continuance "shall be granted because of . . . lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government."

When the district court granted the government's motion for a continuance in December 1980, it made the findings required by the Act for a continuance that creates excludable delay. But in its May 22 ruling, the court decided that the real reasons for the delay were not valid reasons under the Speedy Trial Act for an excludable continuance. The court stated that one reason for the delay was that the government had been trying to negotiate a plea, which the court said was not a basis for excludable delay. The other reasons that the court thought were invalid grounds for excludable delay were the efforts of the government attorney to save travel expenses, the change of government attorneys, the fact that the government "was having trouble with the bureaucracy in Washington," and the fact that the government "was having trouble with the Court, since I didn't like the format of the Letters Rogatory order and suggested that it be re-drafted. None of these unfortunately, are adequate reasons for excludable time."

The court apparently thought that if the actual causes of the delay in beginning the trial were not valid grounds for the grant of an excludable continuance, it *had* to vacate the continuance retroactively to the original trial date; the Speedy Trial Act, which the court said "takes us out of the real world," left him with no choice. We disagree. There is nothing in the Speedy Trial Act which says that a continuance valid when granted becomes invalid *ab initio* if the reasons for which the continuance was granted turn out not to be the actual causes of the delay that the continuance allows. Contingencies not foreseen when the continuance was asked for and granted may arise that prevent the government from using the continuance for the purposes for which it was granted. If so, the court can refuse to grant further continuances; it can revoke or shorten the continuance; but it is not *required* to revoke the continuance with effect back to the original trial date. We are unwilling to read so inflexible a mandate into the Act.

An alternative reading of the district judge's opinion is that he was revoking the continuance with effect back to the original trial date as a discretionary sanction for the government's misuse of the time allowed it by the continuance. Courts do have broad and flexible powers to prevent the abuse of their processes; but where, as here, the exercise of those powers results in forever precluding the government from trying defendants accused of serious crimes, there is a danger that it is the powers themselves that are being abused. To dismiss an indictment with prejudice, as the court in effect did here, is to punish not only the prosecutor but the entire law-abiding public. Alternative sanctions are available that do not involve such windfalls for law breakers. They include, as we have already noted, revoking or shortening continuances, with prospective effect only; and refusing to grant further continuances. A judge could (but did not here) expressly condition the grant of a continuance on the government's taking specified actions according to a prescribed timetable. He also has the power to apply sanctions directly to counsel who commit knowing violations of the Speedy Trial Act. *See* 18 U.S.C. § 3162(b). Such sanctions have the attractive characteristic that they do not prevent punishment of criminals as a by-product of trying to prevent misconduct by government officers.

We do not exclude the possibility that in appropriate cases, for example where the government had procured a continuance by deliberate misrepresentation and the delay caused by the continuance was seriously prejudicial to the defendant, the trial court could revoke the continuance retroactively as a sanction for the misconduct and a protection for the defendant. Indeed, in so extreme a case the court would be acting well within the powers expressly granted it by Rule 48(b) of the Federal Rules of Criminal Procedure if it dismissed the indictment without reference to the time limits in the Speedy Trial Act. This was not such a case. There is no suggestion either that the government made deliberate misrepresentations in procuring the continuance or that defendants were in the least bit prejudiced by the delay that the continuance caused. Indeed, it is not even clear that the reasons that the court in its opinion revoking

the continuance said were invalid grounds for an excludable continuance really were invalid. The unavailability of an essential witness is an independent ground for tolling the time limits in the Speedy Trial Act. *See* 18 U.S.C. § 3161(h)(3)(A). This ground may well have been available to the government under the facts of this case; and certainly the absence of an essential witness is one of the factors that a trial court is entitled to consider in deciding whether to grant an excludable continuance. While plea bargaining is not an express ground for an excludable continuance, where, as here, it is undertaken for the purpose of obtaining substitute evidence for the testimony of an essential witness who is unavailable, the delay resulting from plea bargaining could properly be considered a delay caused by the unavailability of the witness. Nor was the change of prosecutors a *per se* invalid ground either, as the court seems to have thought; continuity of government counsel is one of the factors that the court is required by 18 U.S.C. § 3161(h)(8)(B) to consider in deciding whether to grant an excludable continuance. So the actual and ostensible causes of delay may in fact have coincided in this case; and if they did not, still the facts do not reveal a pattern of abuse that would justify a trial court in revoking a continuance retroactively with the effect of dismissing the indictment with prejudice.

We therefore reverse; and because we think that relations between the trial court and the prosecutor may have become frayed beyond repair by the events leading up to the court's order, pursuant to Circuit Rule 18 we remand the case to a different judge for further proceedings in the matter.

REVERSED and REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 5730—Midwest Law Printing Co., Inc., Chicago—12-23-81—400

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

UNITED STATES OF AMERICA,
Plaintiff,

v.

ANTHONY M. CARLONE, et al,
Defendants.

No. 80 Cr 456

DISTRICT COURT'S ORAL OPINION AND ORDER OF MAY 22, 1981

* * * *

THE COURT: Let me say first that I have considered this matter and had some very great concern over it, and the remarks I am about to make will be the substitute for any written opinion on the matter because I think I know enough about it to rule on the motion that is before me at this time or the several motions.

To put this in context, we start by the recollection that we are dealing with a conspiracy involving arson in Sweden, or Norway—I can never remember which—let's say Scandinavia—in 1975.

September 18, 1980 was the date of the filing of a superseding indictment, and it is my conclusion that any Speedy Trial Act timetable begins to run with regard to the indictment on that date rather than on the date of the original indictment. I have already indicated how I feel about the Speedy Trial Act, and under its pressure we set January 5th as a trial date. The Government was not ready on January 5th, and the trial date was put over to May 11th, although it is not necessary for a decision in this precise issue, the Government was not ready on May 11th and the Government is not ready now. The reason

for the Government's lack of readiness had to do with the necessity to take depositions abroad which became the sine qua non of getting the case ready for trial. Those depositions, I might add, are not yet taken. The delay between the original January 5th trial date and the May 11th trial date, which I had originally regarded as excludable time, was deemed excludable based upon the Government's contention at that time that they were gearing up for an immediate taking of those depositions after the obtaining of Letters Rogatory, and that everybody was working towards that end. The fact that those depositions had not been taken is now explained with a variety of excuses. One, that the Government was trying to obtain a plea which obviously is factual, and I don't quarrel with—unfortunately it is not a basis for excluding time under the Speedy Trial Act in accordance with the legislation and the decision as I understand it. The Government was motivated in its plea negotiations and other things by trying to save the very great expense of the activities abroad, a very commendable goal, but one which the legislature in its infinite wisdom failed to include as a reason for excludable time. The Government had a change of prosecutors which is always a difficulty in cases of this type, but once again not a basis for exclusion. The Government was having trouble with the bureaucracy in Washington which the Government always does when you have to deal with Washington, but not a basis for exclusion, and finally, the Government was having trouble with the Court, since I didn't like the format of the Letters Rogatory order and suggested that it be re-drafted. None of these, unfortunately, are adequate reasons for excludable time.

I have been pushing since December of 1980 to get this case to trial and without success. I do remember the atmosphere of one of the hearings in this court in which my attitude was one of—get these depositions done by the end of January or else. I remember imposing on the Government very stringently the burden of getting this activity taken care of without any further delays, and it was my attitude at the time

that the Government was not acting with diligence and nothing I have heard today has changed that.

I granted a long period of excluded time to allow depositions in Sweden of witnesses who had suddenly, on the eve of trial, become uncooperative. The excludability of that time depended upon the assurances of the Government that they would, with diligence, get the testimony of those witnesses through Letters Rogatory and depositions. That was five months ago, and the depositions have not yet been taken and the Letters Rogatory have not yet been issued.

The Speedy Trial Act imposes a duty of diligence not only on the Court but on the Government. In the real world the Government would have good reasons for doing what it has done, and in the real world I would have respected, in the exercise of my discretion, the problems the Government has been having. The Speedy Trial Act takes us out of the real world and puts us in the structured world of the timetable for that Act and the limited exceptions that the Act provides. The reasons that were given me for excluding the time between the January 5th trial date and the May 21st, I think it was, trial date, have in fact turned out to be non-reasons. The diligence demanded that the Government, under the circumstances and on what I relied, was not forthcoming. The conduct of the Government in the preparation of this case can by no stretch of the imagination be described as diligence. I have sympathy with Ms. Hugo for the difficulty she had. I assume she has done the best she could, but unfortunately under the strictures of the Speedy Trial Act that isn't enough.

The motion of the defendants to reconsider the December 22nd order granting a continuance and excluding the time granted, that motion is granted. I do not regard that time as excludable. That means the motion of the defendants to dismiss by reason of the Speedy Trial Act is granted.

THE HONORABLE
FRANK J. McGARR

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 29, 1982

BEFORE

Hon. Walter J. Cummings, Chief Judge
Hon. Robert A. Sprecher, Circuit Judge
Hon. Richard A. Posner, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

No. 81-2012 *vs.*

ANTHONY M. CARLONE, AVIE COHEN and LEONARD BEDNARZ,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 80-CR-456

Frank J. McGarr, *Judge.*

The defendants-appellees, Anthony M. Carlone, Avie Cohen and Leonard Bednarz, filed a petition for rehearing on January 13, 1982. All of the judges of the original panel have voted to deny the petition, and it is therefore

DENIED.

Opposition

Office - Supreme Court, U.S.
FILED
MAY 3 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 81-1824 and 81-1851

In the Supreme Court of the United States

OCTOBER TERM, 1981

AVIE COHEN AND LEONARD BEDNARZ, PETITIONERS

v.

UNITED STATES OF AMERICA

ANTHONY MICHAEL CARLONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
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In the Supreme Court of the United States

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred in reversing an order dismissing an indictment because of an alleged violation of the Speedy Trial Act, 18 U.S.C. 3161 *et seq.*

Petitioners were charged in a seven-count indictment returned in the United States District Court for the Northern District of Illinois with conspiracy to commit wire fraud (Count 1), in violation of 18 U.S.C. 371; wire fraud (Counts

2, 3, 5, and 6), in violation of 18 U.S.C. 1343; maliciously destroying a warehouse and other property used in foreign commerce (Count 4), in violation of 18 U.S.C. 844(i); and conspiracy to destroy the warehouse of a foreign government (Count 7), in violation of 18 U.S.C. 956. After the case was scheduled for trial on January 5, 1981, the government obtained continuances to take the deposition of a key witness in Sweden and a key witness in Denmark. Initially, the district court directed that the period of the continuance be excluded, pursuant to 18 U.S.C. 3161(h)(8)(A), from the time within which petitioners had to be tried under the Speedy Trial Act. Thereafter, on May 22, 1981, the district court vacated the continuance all the way back to January 5, the original trial date, concluding that the continuance had not been justified. It thereupon dismissed the indictment under the Speedy Trial Act (81-1824 Pet. App. 7a-9a). The court of appeals reversed (81-1824 Pet. App. 1a-6a).

Petitioners contend (81-1824 Pet. 20-30; 81-1851 Pet. 9-23) that the court of appeals should not have reinstated the indictment, arguing that the district court did not abuse its power to dismiss an indictment and that the government had not acted with due diligence. Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motion to dismiss the indictment. In those circumstances, no pretrial appeal would have been permitted. See *United States* v. *MacDonald*, 435 U.S. 850 (1978). If petitioners are acquitted following a trial on the merits, their contentions will be moot. If, on the other hand, petitioners are convicted, they will then be able to present their present contention to this Court, together with any other claims they may have, in

petitions for a writ of certiorari seeking review of a final judgment against them. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[1]

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

APRIL 1982

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[1]Because this case is interlocutory, we are not responding on the merits to the question presented by the petitions.

DOJ-1982-04